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In the Supreme Court of the United States

No. 371

Brief of Respondent
Marine Leopard Cargo in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 371

OLIVER J. OLSON & CO., a corporation,
Petitioner,

vs.

LUCKENBACH STEAMSHIP COMPANY, a corporation, MARINE LEOPARD CARGO, et al.,
Respondents.

Brief of Respondent Marine Leopard Cargo in Opposition

INTRODUCTORY STATEMENT

The *Howard Olson* and the *Marine Leopard*, both unencumbered steam-powered vessels, collided in the vast waters of the Pacific Ocean on a clear calm night after having had each other in sight continuously for 16 miles and over one-half hour. Both vessels navigated to a meeting situation. The *Leopard* turned right for a red to red or port to port passing. The *Olson* turned left at the last minute. Neither reduced speed. This left turn by the *Olson* was too little and too late in the opinion of the District

Court (Tr. 113) and also in violation of Rule 18 (33 U.S. Code 1408) which requires a right turn in a meeting situation. The Court of Appeals agreed that the left turn was in violation of Rule 18, and thus found it "unnecessary to decide whether the Trial Court erred in holding that the *Olson* was also at fault in other respects".[1]

QUESTIONS PRESENTED

The Petition under "Questions Presented", states that "the only evidence of fault on the part of petitioner's vessel was the testimony of *an* interested witness."[2] A reading of the District Court's opinion and findings will show that many witnesses and much evidence, including some of her own, cast the *Olson* of fault. Therefore the only question actually presented is whether this Court wants to review again the proceedings of eight days of trial wherein the principal navigating witnesses and most of the minor witnesses from both vessels testified in person. The District Court found the *Leopard's* witnesses more credible than those of petitioner (D.C. Opinion Tr. 107; D.C. Findings V, VII, Tr. 127, 128).

ARGUMENT

Both courts below have decided that petitioner's "impossibility" argument which it now presents to this Court is

1 The issue of the *Olson's* fault arose in three separate proceedings which were consolidated for trial and which are now consolidated on appeal: 1. the libel filed by Olson against Luckenbach, 2. the libel filed by Luckenbach against Olson, and 3. the petition for exoneration, from, or limitation of, liability filed by Olson.

2 This refers to the *Leopard's* master, Captain Snow. Actually the point made by the Petition relates solely to one position estimated by this witness which it is claimed is impossible. The argument is that both side lights could not have been seen "in the position testified to by Captain Snow" if the *Olson's* course of 320 (Petition, p. 6

neither sound nor dispositive of the case. Petitioner's chart at page 7 of the Petition is not evidence. It is the product of counsel's work and wishful thinking. It represents their version of the collision approach and the point of collision and nothing more. It was presented in argument to both courts, both of which recognized that movements on water cannot be reconstructed with such precision. There are no surveyor's markers on the ocean. The purported track of the *Olson* has nothing but the testimony of her navigator to support it. All her records were lost. All witnesses who estimated the point of collision, including the master and mate of the *Olson* (Tr. 527-8, *Olson* Exhibit 3) and Kittinger, the first officer of the SS John B. Waterman (the "bystander" vessel), (Tr. 1025-6, *Olson* Exhibit 4), differ materially from the position used in counsel's argument and chart. Both courts below preferred the evidence that contradicts counsel's chart; such as the testimony of the *Leopard* witnesses that both sidelights of the *Olson* were seen ahead, the admission of the *Olson*'s look-out that he saw the *Leopard*'s red light ahead before he went off watch 4 minutes before the collision (Tr. 107) and the testimony of the independent witness, Kittinger, watching from the third vessel in the area, that both vessels were at all times "marching right down together on the 180 line" (Tr. 1088), "head and head" (Tr. 1062-1064) on "substantially opposite courses" (Tr. 1086) which were "too close" (Tr. 1066-1067).[3] Such evidence was preferred over

3. Incidentally, this witness' testimony that the *Olson* range lights were open to him and widened off his bow referred to at the bottom of page 8 of the Petition is perfectly consistent with an end on approach between the *Leopard* and the *Olson*. This is so because the witness' vessel was positioned about a half mile inshore of both the *Leopard* and *Olson*. If Kittinger had moved over onto the *Leopard*, the *Olson*'s range lights would close directly ahead of him and maintain the constant bearing of the collision course. He testified that from his position they were only "slightly open" (Tr. 1080).

counsel's attempted reconstruction of the collision approach from selected bits of testimony of their choice.

Although petitioner characterizes its selected bits of testimony as "error-proof observations, by eye and radar" (Petition, p. 8), the Court of Appeals, as well as the District Court, was sophisticated enough to recognize that no such observations are error-proof to say nothing of the error-proofness of the witnesses' recollection. Petitioner attempts to fashion this self-evident circumstance into an "improper standard of review". Nothing so presumptuous is even involved.

This is *not* a case like *United States v. United States Gypsum Co.*, 333 U.S. 364, in which the testimony (to the effect that the various defendants had *not* acted in concert) which the trial judge purported to believe and which this court disregarded was in conflict with hundreds of documents which the witnesses themselves had prepared long before litigation and which clearly showed that the defendants had acted in concert.

Nor is it a case like *Russo v. United States* (2 Cir. 1955), 228 F.2d 317, in which the Court of Appeals refused to consider itself bound by testimony (which the trial court had purported to believe) to the effect that an electric winch had started by itself.

This is a case of a collision at sea involving conflicting testimony and estimates about time, places and distances, about the position of one vessel with respect to another, about what could be seen from one vessel when it was in a certain position and about when it was in that position. In other words, it clearly was a case which would best be decided by the trial judge who saw and heard all of the witnesses.

And the possibility that one of the witnesses whom the trial judge chose to believe in other respects may have made

one erroneous estimate as to the position of one of the vessels at one particular time does not invalidate the trial court's findings. Nor does it mean that the Court of Appeals applied an erroneous standard in reviewing those findings.

Petitioner's attempt (Petition, pp. 16-17) to use the major-minor fault rule[1] to create a presumption of innocence for its vessel has been fully considered below and rejected as not justified by the facts of this case (D.C. Opinion, Tr. 116, D.C. Finding XIV, Tr. 130). Although neither Court below found it necessary to rely on presumptions at all, we suggest that the only presumptions appropriate to this case would be those laid down in cases of steamship collisions occurring in clear weather with oceans of maneuvering room and ideal navigational conditions.

The Comus, 19 F.2d 774, 1927 A.M.C. 860, 863:

> "Where, on a clear night, two vessels see each other six or seven miles apart, and then come into collision on the wide ocean, there is a heavy burden upon each of them to explain their navigation in an endeavor to exonerate themselves from fault."

The Lucanstone, 87 Fed. 769, 772-773:

> "A collision so absolutely indefensible cannot easily be explained upon the theory that but one vessel was responsible * * *. No matter how gross the fault of one, an accident of this character could hardly have occurred without the concurring carelessness of the other."

Yang Tze Ins. Ass'n v. Furness, Withy & Co., 215 Fed. 569, 865:

> "Plain common sense constrains one to such a conclusion. To exonerate either of them under such condi-

[1] As set down in *The City of New York*, 147 U.S. 72 and *The Victory* and *The Pleiades*, 168 U.S. 410.

tions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame."

CONCLUSION

The versions of litigants in collision cases are never the same and seldom reconcilable. Petitioner complains because its version has been rejected by two courts. This does not present a case calling for the supervision of the Supreme Court of the United States. The petition for writ of certiorari should be denied.

Dated: September 21, 1960.

Respectfully submitted,

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